UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Puget Sound Hydro LLC Docket No. JR02-1-001

ORDER ON REHEARING AND DISMISSING PETITION AS MOOT

(Issued October 8, 2004)

1. In this order, we address arguments on rehearing of a decision by the Director of the Division of Hydropower Administration and Compliance, Office of Energy Projects (Director), finding that the Nooksack Falls Project is required to be licensed under section 23(b)(1) of the Federal Power Act (FPA) because its primary transmission line is located on federal land. The project owner asserts that the line is no longer primary. Other parties argue that the project requires licensing because it is located on a navigable river and its refurbishment constitutes post-1935 construction. For the reasons discussed below, we find that licensing is not required because the project is located on a non-navigable river, the transmission line is no longer primary, and the project has not undergone post-1935 construction within the meaning of section 23(b)(1) of the FPA. We therefore dismiss as moot a petition requesting that we order the project to stop operating. This order is in the public interest because it resolves the jurisdictional status of the project.

Background

2. The 1,500-kilowatt Nooksack Falls Project, built in 1906, is located on the North Fork of the Nooksack River in Whatcom County, Washington. The project comprises an intake dam located about 1,000 feet upstream of the 100-foot-high Nooksack Falls; a powerhouse located 1/2 mile downstream from the dam; a 1/2-mile flowline bringing diverted water to the powerhouse; and a 7.27-mile-long, 55-kilovolt (kV) transmission line from the powerhouse to Glacier Substation.

3. The project occupies about 66 acres of private land within the Mount Baker-Snoqualmie National Forest (Forest), except for the transmission line at issue, which

traverses about 35 acres of Forest land within a 7.27-mile-long, 50-foot-wide federal easement.

4. The history of the Nooksack Falls Project is set forth in the Director's March 25, 2004 Order.[1] Briefly, Puget Sound Power & Light Company, now named Puget Sound Energy, Inc. (PSE), operated the project until 1997, when the project generator was destroyed by fire. In January 2001, the Commission issued a three-year preliminary permit (Project No. 11857) to Welcome Springs to study restoring the Nooksack Falls Project to its pre-1997 condition. That permit has expired.

5. In January 2003, Puget Sound Hydro LLC (Puget Hydro) purchased the project and its underlying 66 acres of land from PSE, which retained ownership of the 7.27-mile-long, 55-kV transmission line. In March 2003, the Washington State Department of Fish and Wildlife (Washington DFW), observing that Puget Hydro had begun restoring the project, asked the Commission to determine whether the project requires a license.

6. By letter of March 20, 2003, Commission staff advised Puget Hydro of its belief that the project is required to be licensed. At that time, the Commission Secretary issued notice of the availability of the staff's Navigation Status Report for the North Fork Nooksack River, inviting comments.[2] On April 21 and May 19, 2003, Puget Hydro replied with evidence and arguments as to why the project does not in its view require a license.

7. In response to public notice of the jurisdiction review of the Nooksack Falls Project, the following parties intervened in this proceeding: U.S. Department of Agriculture (of which the U.S. Forest Service is a part), Washington State Department of Ecology (Washington Ecology), Nooksack Indian Tribe Natural Resources Department (Tribe), Welcome Springs, American Whitewater, and Northwest Ecosystem Alliance (Alliance).

8. On March 25, 2004, the Director issued his decision. Puget Hydro filed a request for rehearing, arguing that licensing is not required. Welcome Springs, and American Whitewater and Alliance (jointly) also filed requests for rehearing, arguing that licensing

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[1] *Puget Sound Hydro LLC*, 106 FERC ¶ 62,229 (2004).

[2] Navigation Status Report, North Fork Nooksack River, Washington (Engineering & Jurisdiction Branch, Division of Hydropower Administration and Compliance, Office of Energy Projects, August 2002) (Navigation Report).

is required and that the Commission should order the project to stop operating until it receives a license.

9. On July 21, 2004, American Whitewater and Alliance filed a petition, reiterating their request that the Commission immediately order the Nooksack Falls Project to stop operating. On July 30, 2004, American Whitewater filed the declaration of Paul Engel, a boater who states that he has rafted the relevant stretch of the North Fork Nooksack River. On August 16, 2004, Puget Hydro filed a response to American Whitewater's proffer of evidence, arguing that the Commission should strike it as untimely or reject it as irrelevant. On September 2, 2004, American Whitewater and Alliance filed a motion to clarify the record, addressing what they regard as mischaracterizations of information presented in Puget Hydro's response. They also request that Commission staff visit the North Fork Nooksack River before making a decision about navigability.

Discussion

10. Under section 23(b)(1) of the FPA, a non-federal hydroelectric project must (unless it has a still-valid pre-1920 permit) be licensed if it: (1) is located on a navigable stream of the United States; (2) occupies lands of the United States; (3) utilizes surplus water or waterpower from a government dam; or (4) is located on a body of water over which Congress has Commerce Clause jurisdiction, undergoes construction or major modification on or after August 26, 1935, and affects the interests of interstate or foreign commerce.[3]

11. The Nooksack Falls Project does not utilize surplus water or waterpower from a government dam. Thus, whether licensing is required under section 23(b)(1) is dependent on one of the other three bases for our mandatory licensing jurisdiction.

12. The Director found insufficient evidence to determine that the Nooksack Falls Project is located on a navigable stream. The Director further found that, although the project is located on a non-navigable Commerce Clause stream and affects interstate commerce because of its connection to the interstate electrical grid, there is no evidence that the project has undergone post-1935 construction. However, the Director found that the project is required to be licensed pursuant to FPA section 23(b)(1) because the project's primary transmission line occupies federal land.

13. On rehearing, Puget Hydro argues that the Director erred in finding that the project requires licensing because of its location on federal land. In their joint rehearing request,

[3] 16 U.S.C. § 817(1).

American Whitewater and Alliance argue that the project requires licensing because the North Fork of the Nooksack River is a navigable stream. Welcome Springs agrees, and further argues that the project was abandoned and that its refurbishment therefore constitutes post-1935 construction. These parties also contend, on rehearing or in the recently-filed petition, that the Commission should order Puget Hydro to stop operating the project until it obtains a license.

A. Navigable Waters

14. Section 3(8) of the FPA defines navigable waters as follows:[4]

> "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

15. As the Director correctly observed, a waterway is navigable if "(1) it presently is being used or is suitable for use, or (2) it has been used or was suitable for use in the past, or (3) it could be made suitable for use in the future by reasonable improvements"[5] as a highway for commerce with other states or foreign countries, by itself or by connecting with other waters.[6] Navigability can be shown "from the carriage of ocean liners to the floating out of logs,"[7] and need not be based on commercial use if "personal or private

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[4] 16 U.S.C. § 796(8).

[5] *Rochester Gas & Electric Corp. v. FPC*, 344 F.2d 594, 596 (2nd Cir. 1965) (original emphasis omitted).

[6] 106 FERC ¶ 62,229 at P 19. *See Sierra Pacific Power Co. v. FERC*, 681, F.2d 1134, 1138 (9th Cir. 1982), *quoting The Montello*, 87 U.S. (11 Wall.) 411, 415 (1870).

[7] *Appalachian Electric Power Co.*, 311 U.S. 377, 405 (1940) (*Appalachian*).

use by boats demonstrates the availability of the stream for the simpler types of commercial navigation."[8]

16. The Director found that steamboats had sailed between the mouth of the Nooksack River and Everson, at river mile (RM) 23.2, and that logs or shinglebolts had been floated to at least Ferndale, RM 6.6, from as far up the North Fork Nooksack as Deadhorse Creek, RM 63.3. Thus, the Director found that these portions of the Nooksack River below the project are navigable, because they had been used for transportation of people and property in interstate commerce. However, the Director found insufficient evidence of navigability for the 1.3-mile stretch of river between the project tailrace at RM 64.62 and Deadhorse Creek.

17. There was evidence to suggest that this portion of the river, which American Whitewater has identified as a "Class IV reach," is run by recreational kayakers and rafters, and that commercial rafting outfitters provide guided whitewater trips down the Nooksack River beginning at Douglas Fir Forest Campground (RM 60.1).[9] However, there was no evidence of commercial use of the river from the project tailrace to the campground. Recognizing that, in the absence of actual commercial use, the Commission has declined to find reaches of Class IV and above navigable, the Director

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[8] *Id.* at 416.

[9] As set forth in the Director's order, Class IV rapids are described in the International Scale of River Difficulty, American version, as follows:

> Class IV—Advanced. Intense, powerful but predictable rapids requiring precise boat handling in turbulent water. Depending on the character of the river, it may feature large, unavoidable waves and holes or constricted passages demanding fast maneuvers under pressure. A fast, reliable eddy turn may be needed to initiate maneuvers, scout rapids, or rest. Rapids may require "must" moves above dangerous hazards. Risk of injury to swimmers is moderate to high, and water conditions may make self-rescue difficult. Group assistance for rescue is often essential but requires practiced skills.

106 FERC ¶ 62,229 at P 29 n. 36.

concluded that there was insufficient evidence that the Nooksack Falls Project is located on a navigable stream for FPA purposes.

18. Welcome Springs, American Whitewater, and Alliance argue that the Director erred in this finding. They argue that commercial whitewater activities occur both above and below the project, and that the river from Nooksack Falls past the project tailrace to the campground is capable of supporting such commercial activity with minimal modifications. They maintain that the Director improperly disregarded evidence that commercial rafting companies begin their guided runs well below the project tailrace for reasons of convenience and accessibility and that, with proper public access near the project tailrace, these companies would be able to use this reach of the North Fork Nooksack River. Thus, they argue that this stretch of river is navigable because it could be made suitable for commercial use by reasonable improvements.

19. As noted earlier, a river is navigable for FPA purposes if it is or could be made suitable for commercial use by reasonable improvements. However, the "reasonable improvements" referred to in section 3(8) are those that can be made to the river itself, not to areas adjacent to the river that might provide improved access to it.[10] There is no evidence in the record regarding possible improvements to this reach of the North Fork Nooksack River that might make it suitable for commercial use.

20. In appropriate cases, recreational boating can be used to demonstrate a river's suitability for "the simpler types of commercial navigation."[11] Specifically, a river's suitability for commercial use can be shown if it can be safely navigated by an average recreational canoeist.[12] Suitability can also be shown by "physical characteristics and experimentation as well as by the uses to which the streams have been put."[13] However,

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[10] *See Rochester Gas & Electric Corp.*, 344 F.2d at 598.

[11] *Appalachian*, 311 U.S. at 416.

[12] *See David Zinkie*, 53 FERC ¶ 61,029 at 61,113 (1990) (documented historical account of interstate canoe voyage); *Swans Falls Corp.*, 53 FERC ¶ 61,309 at 62144 (1990) (interstate canoe trips, including rental canoes).

[13] *United States v. Utah*, 283 U.S. 64, 83 (1931). *See FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (2002) (test trips made by canoe, together with the stream's physical characteristics, constitute substantial evidence to support finding of navigability).

we have expressly declined to base a finding of navigability under the FPA on recreational boating where a substantial reach of the river cannot be safely navigated by an average recreational canoeist, but "can only be navigated by a kayak (or comparably specialized sporting craft designed for river running) maneuvered by an expert paddler."[14] In our view, evidence of this specialized type of recreational boating is insufficient to show a river's suitability for the simpler forms of commercial navigation.

21. In one case, we found navigable a 7-mile stretch of Class III-IV rapids that was extensively used by commercial rafting companies to transport passengers in exchange for a fee. We concluded that such use is "the very essence of commercial navigation, thereby demonstrating the river's navigability under section 3(8) of the FPA."[15] Thus, although as a general rule we have regarded Class III-IV rapids as non-navigable, we have recognized that a limited exception is appropriate where use of the river for commercial whitewater boating conclusively demonstrates that the river is suitable for commercial use. Absent such commercial use, however, we continue to believe that recreational whitewater use of Class III-IV rapids provides insufficient evidence from which we may infer a river's suitability for the simpler forms of commercial navigation. In short: "Where historical evidence of use of these reaches is lacking, and the only evidence of suitability for commercial navigation consists of this specialized type of recreational boating, we do not regard this showing as sufficient to support a determination of navigability under section 3(8) of the FPA."[16]

22. Intervenors maintain that, because actual commercial use need not be shown, the evidence of use by recreational kayakers and whitewater rafters demonstrates that the 1.3-mile reach of Class IV rapids in question is suitable for use by commercial whitewater rafting outfitters. They therefore argue that we must find the river navigable

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[14] *PacifiCorp Electric Operations*, 73 FERC ¶ 61,365 at 62,141 (1995) (*PacifiCorp I*), *quoting Pennsylvania Electric Co.*, 56 FERC ¶ 61,435 at 62,549-50 (1991). *PacifiCorp I* involved recreational use by skilled kayakers and whitewater rafters of two 20-mile stretches of Class IV rapids. 73 FERC ¶ 61,365. *Pennsylvania Electric* involved rapids that were described but not classified, with a substantial reach of river that could not be safely navigated by an average recreational canoeist at any time of year, but could only be navigated by a kayak or comparably specialized sporting craft designed for river running, maneuvered by an expert paddler. 56 FERC ¶ 61,435.

[15] *PacifiCorp*, 79 FERC ¶ 61,130 at 61,563 (1997) (*PacifiCorp II*).

[16] *PacifiCorp I*, 73 FERC ¶ 61,365 at 62,141.

based on this evidence. As explained below, we are unable to make this leap in logic to find the river suitable for commercial navigation.

23. The characteristics of Class IV rapids are such that, in our view, they must be regarded as presumptively non-navigable. As the description of these rapids makes clear, they are dangerous and unpredictable, requiring advanced river-running skills.[17] It is for this reason that we have consistently declined to base a finding of navigability on recreational boating when the rapids in question require the use of advanced whitewater boating skills.

24. The fact that, in one case, a stretch of river described as comprising Class III-IV rapids was actually used for commercial purposes does not demonstrate that all such rapids can or should be regarded as similarly suitable for commercial navigation. Absent evidence of actual commercial use of a particular reach of rapids, we do not believe that evidence of recreational whitewater use is sufficient to provide a basis for inferring commercial suitability.

25. For a navigability finding based on suitability, a river must be shown to be suitable for commercial use. Although recreational use may sometimes serve as a proxy for commercial suitability, the recreational use must be of a type that demonstrates suitability for the simpler types of commercial navigation. More is needed than simply the possibility of running the river in some sort of specialized craft, using advanced whitewater boating skills. A river must be "used, or capable of being used as a highway for commerce, over which trade and travel is or may be conducted in the customary

[17] Welcome Springs takes issue with our policy, contending that Class IV rapids require only advanced skills, whereas Class V rapids require expert skills. We see no real distinction for purposes of evaluating the evidentiary significance of recreational whitewater use. We first articulated our policy regarding recreational whitewater boating in *Pennsylvania Electric*, which involved rapids that were described but not classified. 56 FERC ¶ 61,435. We later relied on this policy in *PacifiCorp I*, which involved rapids describes as primarily Class IV or greater. 73 FERC ¶ 61,365. In either case, the rapids were not navigable by the average recreational canoeist, but rather required the use of specialized (advanced or expert) whitewater boating skills. Later, in *PacifiCorp II*, we recognized a limited exception for whitewater boating that involved actual commercial use of the rapids to transport people in exchange for a fee. 79 FERC ¶ 61,130. In that case, the rapids were described as Class III-IV, requiring an intermediate-to-advanced level of skill.

modes of trade and travel on water."[18] In our view, recreational whitewater use of a river is not a customary mode of trade and travel on water.

26. In a recent case involving the Messalonskee Stream in Maine, the U.S. Court of Appeals for the District of Columbia Circuit upheld our navigability determination based on evidence of successful test trips taken in canoes together with the stream's physical characteristics.[19] The licensee argued that the test trips constituted the type of specialized, recreational boating that we have previously disregarded when making navigability determinations. The court reviewed our cases concerning recreational use by skilled kayakers or whitewater rafters and distinguished them, noting that the Messalonskee Stream "at most contains Class II rapids that were successfully crossed by a canoe."[20] The court noted that we have repeatedly found waterways navigable based on canoe trips, and concluded that we did not depart from precedent in relying on successful test trips taken in canoes. Thus, although our cases involving specialized recreational whitewater use were not directly at issue, the court accepted as reasonable a finding of navigability based on canoe use involving, at most, Class II rapids.

27. In addition, the court observed that we did not rely on the test canoe trips alone, but also considered the stream's physical characteristics in making our navigability determination. The court reviewed the evidence concerning the Messalonskee Stream's flow, depth, gradient, width, and capacity, and found it sufficient to support our finding of navigability.[21] Thus, the physical characteristics of a river must be such that a finding of suitability for commercial navigation is reasonable.

28. The Navigation Report states that the "upper reaches of the North and Middle Forks feature pool and riffle areas, as well as cascades and rapids, as they flow westward through mostly steep, heavily forested terrain, converging in a relatively broad valley floor about 5 miles upstream from the town of Deming, forming the main stem of the Nooksack River."[22] Concerning the stretch of river from the project tailrace to Douglas

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[18] *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-22 (1921).

[19] *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002).

[20] *Id*. at 1158.

[21] *Id*.

[22] Navigation Report at 1.

Fir Campgrounds, American Whitewater and Northwest Ecosystem Alliance describe it in their rehearing request as "very similar" to the reach that is commercially used.[23] The Navigation Report describes the stretch of river that is used for commercial whitewater rafting, from Douglas Fir Campgrounds to Maple Falls, as follows: "Rated as 'O.K. for energetic beginners,' the trip starts off with an hour through a narrow steep gorge, dropping more than 45 feet per mile."[24] However, American Whitewater has identified the reach below Douglas Fir Campground as Class II-III rapids, in contrast to the reach from Nooksack Falls to Douglas Fir Campground, which it has identified as Class IV+.[25] This difference in classification calls into question whether the stretch of river in question is suitable for commercial navigation. Given the presence of these Class IV rapids, together with the absence of actual commercial use, we find that the recreational whitewater use of these rapids provides insufficient evidence to support a finding that the North Fork Nooksack River at the project site is suitable for commercial navigation.

29. Welcome Springs argues that thousands of recreational boaters of all skill levels annually boat rivers of Class IV difficulty and below in the Northwest, and that this activity supports a large economic community, both for commercial outfitters and for suppliers for private boating. We do not doubt that recreational whitewater boating affects commerce. However, what is required for purposes of FPA section 3(8) is not an effect on commerce generally, but rather a river's use or suitability for use for commercial navigation. That is, a river must have the capacity for water-borne commerce, which involves use of the river to transport persons or property in interstate or foreign commerce.

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[23] Request for rehearing at 4.

[24] Navigation Report at 8.

[25] *See* American Whitewater's web site, River Reach No. 2172 (North Fork Nooksack River), available at: www.americanwhitewater.org/rivers/id/2172/ . American Whitewater and Alliance call attention to this portion of the description of the river from the web site: "Although there are rapids at the base of the falls and it is navigable, access is a challenge and then the channel consists of class II gravel bar sections with a fair amount of wood." *Id*. The remainder of the description mentions Class III+/-IV drops, a big log jam, and a bench drop, as well as an undercut and pin rock to avoid. This description, while useful, addresses navigability from the standpoint of whitewater recreational use, not suitability for commercial navigation within the meaning of FPA section 3(8). In addition, as noted earlier, the entire 4.9-mile run is rated Class IV+.

30. American Whitewater and Alliance argue that commercial boating operations across the country commonly use Class IV rapids, and that many commercial operators seek out Class IV and V level rapids. They therefore maintain that the presence of Class IV rapids on the North Fork Nooksack River does not make the river unsuitable for commercial boating and thus, navigation. Welcome Springs goes further, urging us to deem non-navigable only reaches with Class V rapids and above, because Class IV rapids are widely used both for recreation and commercially. We agree that the presence of Class IV rapids might not necessarily make a river unsuitable for commercial use. However, we are unwilling to presume that, because some Class IV rapids might prove to be commercially navigable, all such rapids should be regarded as similarly suitable for commercial navigation. In short, whitewater use of Class IV rapids is sufficiently difficult that we are unwilling to infer a river's suitability for commercial navigation based on the presence of these rapids or their recreational use.

31. American Whitewater and Alliance argue that the Commission should not use the difficulty scale at all because it is not a measure of commerce. Rather, they argue that we should consider the presence or absence of commerce or the potential for commerce. We disagree. Where evidence of actual commercial use is lacking, the difficulty scale is a measure of navigability that we can use, together with any other available information, to assess a river's potential to support commercial navigation.

32. Welcome Springs argues that "any policy based on the type of watercraft is ambiguous and imprecise, and should not be continued."[26] Welcome Springs points out that canoes are used for whitewater racing and there are many types of kayaks (ocean, flat-water, slalom); some with hard shells, some inflatable, and some with rigid frames and flexible skins. We agree that the type of craft, while relevant, is not definitive. The key issue is a river's suitability for commercial navigation, which is a function of the difficulty of the waterway. Use by some types of craft, such as canoes, can demonstrate a river's suitability for the simpler forms of commercial navigation.[27] Thus far, the

[26] Request for rehearing at 3.

[27] Other types of craft that have been found sufficient to demonstrate commercial suitability include powered boats with a load capacity of approximately 1000 pounds and rafts with a maximum load capacity of 2,000 pounds, *see State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989) (navigability for state title purposes); as well as "16- to 20-foot wooden or aluminum boats with 25-to 50-horsepower outboard motors." *Iliamna-Newhalen-Nondalton Electric Cooperative, Inc.*, 58 FERC ¶ 61,065 at 61,151 (1992) (navigability for purposes of FPA section 3(8)). *See also State of Alaska v. United States*, 754 F.2d 851, 855 (9th Cir. 1985) (use of lake for takeoff and landing of floatplanes and

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evidence presented in our cases has not suggested any basis for questioning the reasonableness of a navigability finding based on canoe use. However, we will continue to consider all of the relevant evidence, including a river's physical characteristics, on a case-by-case basis to determine whether any particular use of a river by canoes is sufficient to support a finding of suitability for the simpler forms of commercial navigation.

33. American Whitewater and Alliance argue that, because the FPA definition of navigable rivers includes the interrupting falls, shallows, or rapids requiring portage, an "interruption" of Class IV or V rapids is not relevant and cannot provide a basis for finding a river non-navigable. While it is true that FPA section 3(8) includes as navigable waters any "interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage," this does not mean that all interrupting rapids are automatically included as part of a navigable river. Rather, the phrase "compelling land carriage" requires evidence that portaging was or is feasible, and that the interrupting falls or rapids occur between navigable segments of a river that was or is used, or is suitable for use, as a continuous highway for commerce.[28] Here, there is no "interruption," because the river above the project is not navigable. American Whitewater and Alliance apparently base their argument on the fact that recreational

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related incidental watercraft is not a customary mode of trade and travel on water and is insufficient as a matter of law to render lake navigable for purposes of state title).

[28] *See Consolidated Hydro v. FERC*, 968 F.2d 1258 (D.C. Cir. 1992) (affirming Commission's finding that a canoe race on the Damariscotta River that included a 100-yard portage around the project dam provided grounds for concluding that the river is navigable); *Montana Power Co. v. FPC*, 185 F.2d 491, 494 (D.C. Cir. 1950) (affirming Commission's finding that the Missouri River is navigable despite the presence of a 17-mile stretch of rapids and falls, based on evidence that gold miners had traveled downstream with the aid of land carriage around the falls); *Sierra Pacific Power Co. v. FERC*, 681 F.2d 1134, 1139 (9th Cir. 1982) (reversing Commission's finding of navigability for the Truckee River on grounds that a 14-mile stretch of rocky passages, with a gradient of between 25 and 40 feet per mile and including a boulder-filled one-half mile section with a drop of 100 feet per mile, could not be considered an "interruption" under FPA section 3(8), because the river was not used or suitable for use as a continuous highway for commerce between California and Nevada); *Rochester Gas & Elec. Corp. v. FPC*, 344 F.2d 594 (2nd Cir. 1965) (upholding Commission's finding that, because the Genessee River was navigable above and below stretch of rapids and falls where three projects were located, the rapids and falls themselves were navigable waters).

whitewater use occurs above the project, and commercial whitewater use occurs below it. As we have seen, however, there is no evidence of commercial whitewater use above the project, and no other evidence to suggest that any portion of the river above the project tailrace is navigable. As noted, the 1.3 mile stretch of Class IV rapids at issue is part of the 4.9-mile Horseshoe Bend run. Immediately upstream of that run is a 4-mile stretch of rapids (from the Mt. Baker Wilderness area to Nooksack Falls) that American Whitewater has rated Class V.[29] There is nothing in the record to indicate that any part of the river above those rapids is navigable. Therefore, we have no basis for finding that this stretch of Class IV and V rapids could be considered an interruption compelling land carriage within the meaning of FPA section 3(8).

34. Finally, we find nothing in American Whitewater's proffer of additional evidence or motion for clarification that would cause us to change our finding of non-navigability.[30] The declaration of Paul Engel, a commercial whitewater rafting guide, establishes that Mr. Engel has guided many commercial trips on Class V rapids, and has canoed and rafted on the North Fork Nooksack River from mile marker 37 on state highway 542 to the Douglas Fir Campground (referred to as the Horseshoe Bend run). As Puget Hydro points out, Mr. Engel began his trips on the Horseshoe Bend Run downstream of the project (based on Puget Hydro's calculations, it appears that Mr. Engel entered the river at RM 61.6, whereas the project tailrace is at RM 62.64). More importantly, however, the declaration describes Mr. Engel's non-commercial, recreational use of these rapids, including a guided trip in the spring of 2004 that "required specialized techniques and equipment."[31] In light of the standard we believe is appropriate for evaluating evidence of whitewater boating, we find that this information does not provide a sufficient basis from which we may infer that the river is suitable for commercial navigation.

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[29] *See* American Whitewater's web site, River Reach No. 2173 (North Fork Nooksack River), available at: www.americanwhitewater.org/rivers/id/2173/ .

[30] Although this additional evidence and motion come late in the proceeding, we have considered them, together with Puget Hydro's response, because they concern the Commission's jurisdiction. *See, e.g., Chippewa and Flambeau Improvement Co. v. FERC*, 325 F.3d 353, 356 (D.C. Cir. 2003) (citing *Nantahala Power and Light Co. v. Federal Power Commission*, 384 F.2d 200, 203-04 (4th Cir. 1967) (Commission may reexamine its jurisdictional determinations to take into account changes in relevant facts and governing law).

[31] Declaration of Paul Engel at 2 (filed July 30, 2004).

B. Federal Lands

35. Under section 23(b)(1) of the FPA, a project must be licensed if any of its project works are located on U.S. lands or reservations. Section 3(12) of the FPA defines "project works" as "the physical structures of a project."[32] A "project" is defined in section 3(11) of the FPA as a "complete unit of improvement or development," including "the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system."[33]

36. As the Director correctly observed, the Commission defines "primary transmission lines" for FPA purposes as those necessary to ensure the viability of the project in the event of federal takeover. The Director explained:[34]

> If a line is used solely to transmit power from a Commission-licensed project to a load center, and if without it there would be no way to market the full capacity of the project, then that line is primary to the project. However, if a line serves both the project and a distribution system or interconnected transmission system, it is not a primary line.

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[32] 16 U.S.C. § 796(12).

[33] Section 3(11) provides:

> (11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights-of-way, ditches, dams, reservoirs, lands or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.

16 U.S.C. § 96(11).

[34] 106 FERC ¶ 62,229 at P 34 (citations omitted).

37. Puget Hydro had argued that the project's primary transmission line extended only 200 feet from the project powerhouse to a PSE substation located on project land, and that PSE was delivering retail electricity from this substation for non-hydro related uses in the vicinity of the project. The Director found that, although a retail meter had been installed on the transmission line and Puget Hydro had plans to develop three residences on its property, there was insufficient evidence that PSE was actually using the 7.27-mile transmission line to supply non-project retail customers. The Director found no basis for concluding that "the mere installation on the primary line of a retail meter, irrespective of whether there are customers receiving system power, suffices to render the line no longer primary."[35] The Director recognized that if non-project retail customers for PSE power later connected to the transmission line, it would no longer be primary. Based on the facts presented, however, the Director found that the 7.27-mile transmission line is the project's primary line and occupies federal lands. The Director therefore concluded that the entire project is required to be licensed under FPA section 23(b)(1).

38. On rehearing, Puget Hydro argues that the Director erred in this determination, basing it on a misunderstanding of the two different types of meters that are present and the different functions that they serve. Puget Hydro also requests that, if the Commission denies rehearing, it provide further clarification of the issue.

39. Puget Hydro explains that, shortly after purchasing the project and its accompanying 66-acre parcel of land from PSE, Puget Hydro began hydro development work at the site. At the same time, Mr. Arch Ford, the sole owner of Puget Hydro, began work related to non-project development of the site for residential and commercial purposes. Puget Hydro states that PSE has been providing both station service to the project and non-project related retail service to Mr. Ford since the Project began generating on May 2, 2003.

40. Puget Hydro contracted with PSE to rehabilitate the 7.27-mile, 55-kilovolt (kV) PSE line to the project and to install a two-way revenue meter to measure both Project generation and station service. The revenue meter is located at PSE's substation, approximately 200 feet from the project powerhouse, and measures both project power delivered to PSE and net station service taken from PSE when the Project is not generating power. PSE supplies station service to Puget Hydro at 2,300 volts, and PSE bills Puget Hydro for net energy consumed (project generation less station service). A transformer at the substation reduces the power from 55 kV to 2,300 volts.[36]

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[35] *Id*. at P 39.

[36] *See* affidavit of Arch Ford at 1 (attached to Puget Hydro's request for

(continued…)

41. In response to Mr. Ford's request, PSE also installed a residential retail meter at the water well pump house, which is located approximately 500 feet from the PSE substation. This meter is used to record power supplied to Mr. Ford for his residential and commercial development activities, including water-well pumping, building heat, and construction of a residence on the 66-acre parcel. PSE supplies this power to Mr. Ford at 220 volts via a step-down transformer at the substation, and bills Mr. Ford for this retail service.[37]

42. Thus, there are two step-down transformers at the PSE substation, and PSE supplies retail service to Mr. Ford with transmission and distribution lines that are distinct from the Project's primary transmission line. The latter line carries project power to the PSE substation, which is the point of junction with the interconnected primary transmission system, and also supplies station service to Puget Hydro when the project is not generating. We therefore find that the project's primary transmission line ends at the PSE substation, approximately 200 feet from the powerhouse. As a result, no part of the project is located on federal lands, and licensing is not required under FPA section 23(b)(1).

C. Post-1935 Construction

43. Section 23(b)(1) requires that a project be licensed if it is located on a Commerce Clause stream, affects the interests of interstate or foreign commerce, and has undergone construction or major modification on or after August 26, 1935.[38] The Director found

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rehearing); *see also* Puget Hydro's comments regarding jurisdictional status at 20 and Attachment 15 to those comments (filed April 21, 2003).

[37] Although Mr. Ford is Puget Hydro's sole member, this does not affect our analysis of the retail power that PSE has supplied to Mr. Ford for construction and other non-Project-related purposes. Initially, Mr. Ford intended to rehabilitate the pump house and convert it to a residence. Later, in October 2003, Mr. Ford obtained permission to build a separate residence adjacent to the renovated pump house. Although Welcome Springs sought to characterize Mr. Ford's remodeling of the pump-house as project-related, we find nothing in the record to suggest that either building is necessary for project purposes. *See* Affidavit of Arch Ford at 2-3 (attached to Puget Hydro's request for rehearing).

[38] On that date, Congress amended the FPA to change from voluntary to mandatory the filing with the Commission of a developer's declaration of intent to construct a dam or other project works on a Commerce Clause stream. The purpose of

(continued…)

that the Nooksack Falls Project is located on a non-navigable Commerce Clause stream and affects interstate commerce because of its connection to the interstate electricity grid.[39] However, the Director found that the project had not been the subject of post-1935 construction within the meaning of section 23(b)(1).

44. Ordinary maintenance, repair, and reconstruction activity with respect to a project built before 1935 do not constitute post-1935 construction for purposes of section 23(b)(1). Rather, as established in *Puget*, such construction must entail enlargement of the generating capacity, impoundment/diversion structure, or other significant aspects of the physical plant.[40] As the Director correctly concluded, there is no evidence of post-1935 construction at the Nooksack Project under the *Puget* rule.[41]

45. A recognized exception to this rule concerns the repair and reconstruction of a pre-1935 project that has been shut down and abandoned. An abandoned project is one for which both project generation and project maintenance have ceased. A finding of post-1935 construction at an abandoned project (*i.e.*, post-abandonment construction) requires that some construction work be done on the project before generation is restored.[42] The Director found that although generation had ceased at the Nooksack Project, maintenance

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the declaration was to allow the Commission to determine whether the project would affect commerce and would therefore require a license. Because the amendment was prospective only, it did not require licensing of projects built before 1935 (that were not required to be licensed on other grounds, for which section 23(b) already compelled a license), unless they were the subject of new construction after 1935. *See Farmington River Power Co. v. FPC*, 455 F.2d 86 (2nd Cir. 1972).

[39] Commerce Clause waters include the headwaters and tributaries of navigable waters. *See FPC v. Union Electric Co*., 381 U.S. 90, 97 (1965). A project that is interconnected to the interstate electrical grid affects the interests of interstate or foreign commerce. *See Habersham Mills v. FERC*, 976 F.2d 1381 (11th Cir. 1992).

[40] *See Puget Sound Power & Light Co. v. FPC*, 557 F.2d 1311 (9th Cir. 1977) (*Puget*).

[41] (106 FERC ¶ 62,229 at P 43).

[42] *Hodgson v. FERC*, 49 F.3d 822, 827-28 (1st Cir. 1995); *Aquenergy v. FERC*, 857 F.2d 227, 230 (4th Cir. 1988); *see James M. Knott, Sr.*, 102 FERC ¶61,241 at P 32 (2003), *reh'g denied*, 103 FERC ¶ 61,315 (2003) (*Knott*); *appeal pending, James M. Knott v. FERC*, No. 00-1909 *et al.* (1st Cir. filed July 21, 2000, *et al.*).

had not, and therefore the project had not been abandoned. Consequently, the Director found that Puget Hydro's subsequent restoration of the project did not constitute post-1935 construction pursuant to FPA section 23(b)(1).

46. On rehearing, Welcome Springs argues that the project was abandoned because PSE performed no significant maintenance after a fire destroyed the project generator in 1997, and ceased maintaining the project altogether after it withdrew its license application for a proposed expansion of the project in 1999. Welcome Springs asserts that the only activity that PSE performed at the site between 1999 and its sale of the project to Puget Hydro in 2003 was to board up the powerhouse after vandalism had occurred. Welcome Springs further asserts that PSE has provided no documentation supporting its allegation that it regularly visited the site to check on the facility and to conduct periodic cleaning and repairs. In support, Welcome Springs relies on three reports prepared by the Commission's Portland Regional Office: a *Prelicense Operation Report*, prepared in 1999 in connection with PSE's proposed expansion of the project; and a *Special Environmental Inspection Report* and *Special Operation Report*, both prepared in 2003 in response to a complaint by the holder of the (now expired) preliminary permit for the project.[43]

47. Welcome Springs excerpts numerous quotes from these reports in an attempt to demonstrate that PSE abandoned all maintenance of the project and allowed it to fall into complete disrepair. However, as the Director correctly recognized, the record in this proceeding shows that PSE's efforts, while not exemplary, do not support a finding of project abandonment as defined in the relevant cases.[44] Specifically, the Director contrasted the situation here with that in *Knott*, where the Commission found that "the owner abandoned the entire project and made no attempt to keep it operable."[45]

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[43] *Prelicense Operation Report*, Project No. 3721 (issued November 3, 1999); *Special Operation Report*, Project No. 11857 (issued February 27, 2003); *Special Environmental Inspection Report*, Project No. 11857 (issued February 27, 2003). These documents are included as attachments 27, 26, and 29, respectively, to Puget Hydro's comments (filed April 21, 2003).

[44] 106 FERC ¶ 62,229 at P 48-50.

[45] 106 FERC ¶ 62,229 at P 49, *quoting Knott*, 102 FERC ¶ 61,241 at P 39. In *Knott*, the prior owner "departed the scene, leaving the mill and the project works without maintenance or repairs." 102 FERC ¶ 61,241 at P 34. Similarly, in *Aquenergy*, the owner "simply abandoned the project. The entire thing was closed down. The turbine was apparently removed, but the rest was left for deterioration to take its toll and nature

(continued…)

48. Welcome Springs points out that the 1999 *Prelicense Operation Report* states that "no significant maintenance has been performed at the project since the plant went off-line."[46] However, that same report also notes that "project structures appeared to be in satisfactory condition",[47] "very little maintenance has been needed",[48] and "the project is visited twice a month to check for vandalism and possible problems".[49]

49. Welcome Springs further relies on the summary in the *Special Environmental Report*, which states:[50]

> The Nooksack project last operated in 1997 when a fire destroyed the generator. Since that time the woodstave pipeline sustained some damage by falling trees and by drying out. The powerhouse interior sustained extensive damage by vandals and rats. [PSE], the project owner in 1997, sold the project to Mr. Arch Ford in late 2002. Under Mr. Ford's direction, the project is undergoing extensive maintenance work and repairs to return it to operational status.

Similarly, Welcome Springs points out that the *Special Operations Report* refers to a "lack of maintenance by the prior owner",[51] and the "significant amount of maintenance work [that] is in progress to return the project to operational status".[52]

50. However, the extent of repairs and maintenance that may be required to return a project to service is only relevant in the event that the Commission concludes that the project has been abandoned. In that case, the Commission must then determine whether

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to heal her wounds." 857 F.2d at 230.

[46] *Prelicense Operation Report* at 1.

[47] *Id*.

[48] *Id*. at 7.

[49] *Id*.at 6.

[50] *Special Environmental Report* at 1.

[51] *Special Operations Report* at 1.

[52] *Id*. at 4.

the repairs and maintenance constitute construction.[53] Project abandonment has been found when project owners have vacated the premises and made no effort to prevent the project from falling into disrepair and decay. As the Director recognized, the record in this case does not support such a finding.

51. PSE undertook periodic maintenance, cleaning, and repairs, and boarded up the powerhouse after discovering that vandals had damaged it.[54] PSE "partially repaired" a crack in the concrete box flume.[55] According to the *Special Operation Report*, prepared shortly after Puget Hydro acquired the project, the diversion dam and intake structure were in good condition; the wood-stave pipe was in fair condition; and the unlined tunnel, two Pelton wheels, switchyard, and transmission line were in good condition.[56] Thus, the report does not suggest that PSE had allowed the project to fall into disrepair and decay.

52. Welcome Springs maintains that by allowing PSE to withdraw its license application without resolving the jurisdictional status of the project, the Commission demonstrated that it considered the project to have been abandoned. Welcome Springs relies on the fact that the Commission had determined in 1964 that the project required a

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[53] *See Aquenergy*, 857 F.2d at 230; *Hodgson*, 49 F.3d at 827-28.

[54] *See* Letter to Arch Ford, Puget Hydro, from Lloyd Pernela, PSE, dated April 17, 2003 (included as attachment 28 to Puget Hydro's comments). Welcome Springs criticizes PSE's boarding up of the powerhouse as inadequate, and points out that Puget Hydro rather than PSE was required to repair the powerhouse and the project flowline. PSE's boarding up of the powerhouse to prevent further damage was consistent with its intent to preserve the project rather than to abandon it. The flowline was damaged by falling trees during a windstorm in the spring of 2002. PSE agreed to sell the project to Puget Hydro in late 2002, and completed the sale in January of 2003. In these circumstances, we do not regard as unreasonable PSE's decision to defer repairing the flowline and powerhouse, thereby allowing the new owner to undertake the necessary repairs.

[55] *Special Operational Report* at 4. Welcome Springs discounts this as an "old" repair, contending that it does not represent any recent maintenance or repair activity. However, the age of any particular repair is not dispositive. The issue is whether PSE's overall course of conduct indicates that it did not abandon the project.

[56] *Id*.

license because its primary transmission line was located on federal lands. In 1974, however, the Commission apparently took the opposite view, stating that the project was not under license and there was no indication that it would come under the Commission's jurisdiction.[57] Thus, there was no need to review the project's jurisdictional status in connection with the withdrawal.

53. Welcome Springs further maintains that the Commission could not have issued a preliminary permit for the project unless it had determined that the project was abandoned, because to do otherwise would violate the Commission's policy against "claim jumping." As a general policy, the Commission has stated that it will not issue a preliminary permit to anyone other than the project owner for an existing, unlicensed project that does not require licensing. However, the Commission will consider any license applications that are filed for such projects if they propose to develop additional capacity at the site.[58] As noted, the preliminary permit has since expired, and the fact that it may have been issued despite the Commission's stated policy does not constitute a finding of project abandonment.

54. In short, the record does not support a finding that PSE abandoned the project. Accordingly, the maintenance and repairs that Puget Hydro undertook to return the project to service do not constitute post-1935 construction within the meaning of FPA section 23(b)(1).

D. Petition to Stop Project Operation

55. For all the foregoing reasons, we find that the Nooksack Falls Project is not required to be licensed pursuant to section 23(b)(1) of the FPA. We therefore dismiss as moot the petition, filed by American Whitewater and Alliance, requesting that we order the project to stop operating until a license is obtained. A few clarifications are nevertheless desirable.

56. Welcome Springs asserts that Puget Hydro should have filed a declaration of intent before beginning any rehabilitation of the project, and that the Commission should not have allowed PSE to withdraw its license application in 1999 without first resolving

[57] *See* letter from Leo Forquer, FERC, to Earl DeVries, Dutchman Consolidated Mines, dated February 6, 1974 (included as attachment 24 to Puget Hydro's comments).

[58] *See Inghams Corp*., 52 FERC ¶ 61,107 (1990), *reh'g denied*, 58 FERC ¶61,033 (1992).

the project's jurisdictional status. The owner of a project constructed before 1935 that is not subject to the Commission's mandatory licensing jurisdiction need not file a declaration of intent to repair, maintain, or rehabilitate the project as long as there has been no project abandonment, and no enlargement is contemplated that would constitute post-1935 construction. PSE's license application contemplated an enlargement of the project that would involve post-1935 construction and would therefore require a license. The Commission allowed the withdrawal of the license application because PSE had decided not to proceed with the proposed enlargement. Similarly, although the proposal for an enlarged project required a license and was therefore subject to the Commission's dam safety regulations in 18 C.F.R. Part 12, the existing project would not have remained subject to Part 12 unless it required a license under section 23(b)(1) of the FPA.[59]

57. Welcome Springs also argues that the Commission should not have allowed PSE to withdraw its license application, or Puget Hydro to begin repairing the project, without undertaking some review pursuant to the National Historic Preservation Act (NHPA),[60] or the Endangered Species Act (ESA).[61] This is incorrect. Both the NHPA and the ESA apply to the Commission's proposed licensing actions under the FPA. However, the Commission must have jurisdiction over a proposed action under the FPA before it can exercise any authority to implement other statutes to protect the various resources that may potentially be affected.[62]

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[59] *See* 18 C.F.R. § 12.1 (2004) (regulations in Part 12 apply to licensed projects, and unlicensed projects for which the Commission has determined that a license is required).

[60] 16 U.S.C. § 470 *et seq*.

[61] 16 U.S.C. § 1531 *et seq*.

[62] *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (ESA requires a federal agency to use its authority to carry out the ESA's objectives, but does not expand the powers conferred on an agency by its enabling act); *see also* section 106 of the NHPA, which applies to federal agencies having direct or indirect jurisdiction over a proposed federal or federally-assisted undertaking, which includes licensing actions. 16 U.S.C. § 470*f*.

The Commission orders:

(A) The requests for rehearing filed in this proceeding by Welcome Springs on April 21, 2004, and by American Whitewater and Northwest Ecosystem Alliance on April 23, 2004, are denied.

(B) The request for rehearing filed in this proceeding by Puget Sound Hydro LLC on April 23, 2004, is granted.

(C) The petition to order the Nooksack Falls Project to cease operating, filed in this proceeding by American Whitewater and Northwest Ecosystem Alliance on July 21, 2004, is dismissed as moot.

By the Commission. Commissioner Kelly dissenting with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Puget Sound Hydro, LLC. Docket No. JR02-1-001

(Issued October 8, 2004)

KELLY, Commissioner, dissenting:

I believe that the 1.3-mile stretch of river between the Nooksack Falls Project and Deadhorse Creek is suitable for commercial use, and should be deemed navigable under section 3(8) of the Federal Power Act (FPA). Accordingly, I disagree with the order to the extent it finds that licensing is not required because the project is located on a non-navigable river. In addition, I disagree with the order's finding that the characteristics of Class IV rapids must be regarded as presumptively non-navigable.

Under the FPA, a river may be deemed navigable if it is *presently* used or is suitable for use, has been used or was suitable for use in the *past*, or could be made suitable for use in the *future* by reasonable improvements for the transportation of persons or property in interstate or foreign commerce. A project requires licensing if any of its project works is located on a navigable stream. As the order recognizes, navigability can be shown from the carriage of ocean liners to the floating out of logs. In addition, actual commercial use is not necessary to find a river suitable for commercial use. For example, evidence of recreational boating has long been employed as an acceptable method to demonstrate a river's suitability for commercial navigation. In other words, recreational use has been recognized as a "proxy" for commercial use.

There is evidence of both recreational and commercial whitewater rafting along the Nooksack River. While the more difficult stretches of the river can require specialized techniques and equipment, this should not lead to a conclusion that the river is presumptively non-navigable. It is the relative difficulty of the river which makes it appealing to a large number of boaters. American Whitewater describes the North Fork of the river as a "[s]hort little creek good for the advanced boaters who want some fun before joining intermediates for the run from Douglas Fir Campground down." See June 30, 2003 comments filed by Welcome Springs. In addition, the declaration of Paul Engel, a commercial whitewater rafting guide, indicates that he has navigated the rapids numerous times, including one time as a guide to a group of paddlers. This evidence should not be discounted simply because Puget Hydro alleges these trips were on rapids that are

located slightly downstream of the project tailrace. Even if Puget Hydro's allegation is true, the successful navigation of downstream rapids has significance, as the upper and lower sections of rapids are very similar and both stretches of river carry the same Class IV difficulty category.

In addition, there is evidence of other commercial whitewater activities below the project. While the downstream whitewater runs do not begin at the project tailrace, this is a matter of convenience as there is better public access to the river slightly downstream. A River Description confirms that the upper stretch near Nooksack Falls is "less frequently boated" and that "access is a challenge." See June 30, 2003 comments filed by Welcome Springs. Were there adequate public access from the project area, there is good reason to believe that the trips would begin further upstream near the project tailrace.

In addition to evidence regarding current usage, there is substantial record evidence that the North Fork of the Nooksack supported commercial sawmills and shingle mills in the late 1800's, and that log bolts were cut upstream and floated down river to mill sites. The commercial floatation of logs or shingle bolts has been deemed sufficient to support a finding of navigability, and I would not discount this evidence simply because it is not possible to confirm with certainty that the shingle bolts or logs were placed in the river within 1.3 miles of the project tailrace.

The Commission is afforded considerable deference when interpreting suitability for use in commerce under the FPA. I believe that we must use a rule of reason when considering whether a river could be useful to a commercial enterprise. There is little doubt that whitewater rafting is a thriving commercial business in the Pacific Northwest. We see that stretches of the river with rapids similar to those seen at the project tailrace support abundant commercial activity. I believe that this fact, combined with evidence that the North Fork of the river was successfully used for logging enterprise at the turn of the 20th century, is sufficient to presume navigability.

To the extent that the majority found this evidence to be insufficient, I believe that the appropriate course of action would be to order an evidentiary hearing. In similar cases, the Commission has set the issue of a river's navigability for hearing to determine the physical characteristics of the stream, the difficulty associated with navigating the waterway, and the nature and frequency of actual use. In one such case, test trips were conducted by the parties to the hearing, and navigability was affirmed based on three successful test trips and an analysis of physical characteristics.

While the existing evidence is not overwhelming, I believe that the totality of the circumstances suggest that this stretch of the river could be suitable for a commercial kayaking business or could have been suitable in the past for a commercial logging business. Accordingly, the river should be deemed navigable and the Nooksack Falls Project should be subject to Commission jurisdiction.

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Suedeen G. Kelly